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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell Mobile Systems, Inc.	)	DA 97-2464
	)	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charges by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole Minute Increments	)	

99-263

To: The Commission

COMMENTS OF BELLSOUTH

BellSouth Corporation ("BellSouth"), on behalf of its wireless subsidiaries and affiliates, by its attorneys, hereby submits these comments in response to the Commission's *Public Notice*, DA 97-2464, "Wireless Telecommunications Bureau Seeks Comment on a Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole Minute Increments Filed by Southwestern Bell Mobile Systems" (released November 24, 1997). For the reasons stated herein, BellSouth supports the Southwestern Bell Mobile Systems, Inc. ("SBMS") Petition for Declaratory Ruling ("Petition") and urges that it be granted forthwith.

DISCUSSION

In its petition, SBMS seeks a ruling from the Commission that the decisions by some CMRS carriers to charge customers for calls in whole minute increments[1] and for incoming calls are just

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[1] Although charging in whole minute increments is also referred to as "rounding up" by SBMS, this term is somewhat misleading in that it denotes elements of unjust enrichment. Charging in whole minute increments is simply the manner in which many CMRS providers like BellSouth

and reasonable under Section 201(b) of the Communications Act of 1934 (the "Act"), and that the states are preempted from regulating such ratemaking decisions under Section 332(c)(3) of the Act. SBMS has filed its petition due to various class action lawsuits pending in state courts around the country which seek to challenge these rate-related decisions by CMRS carriers. BellSouth supports SBMS' petition and believes that given the competitive nature of the CMRS marketplace and the myriad of available rate plans to consumers, the time is ripe for the Commission to issue a declaratory ruling clarifying that decisions regarding rates or charges should be determined by market forces and not by state or judicial intervention.

I. CHARGING IN WHOLE MINUTE INCREMENTS AND FOR INCOMING CALLS IS JUST AND REASONABLE UNDER SECTION 201

The state law challenges to charging in whole minute increments and for incoming calls by CMRS providers have been brought in part under Section 201(b) of the Act,[2] which states that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable."[3] These challenges allege that the rate plans are not just and reasonable, and are therefore unlawful under Section 201(b). Nothing in Section 201 of the Act is violated, however, by charging for calls in whole minute increments or for incoming calls; to the contrary, these rate plans are simply various reasonable alternatives chosen by CMRS carriers in a competitive environment. Thus, the Commission should declare the rate plans to be lawful under Section 201(b).

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charge customers and, in BellSouth's case, is explicitly set forth in the customer's contract.

[2] *See* Petition at 2, 6.

[3] 47 U.S.C. § 201(b). Section 201 applies only to interstate communications, *see* 47 U.S.C. § 201, therefore the following discussion applies to the justness and reasonableness of charging in whole minute increments and for incoming calls solely with respect to interstate CMRS communications.

In determining what is just and reasonable under Section 201(b), the Commission must ascertain whether the rates charged fall within a "zone of reasonableness."[4] Whether or not a rate falls within this zone necessitates determining whether it "reflect[s] or emulate[s] competitive market operations."[5] Such a determination is "not dictated by reference to carriers' costs and earnings, but may take account of non-cost considerations."[6] Thus, for a rate plan to be unlawful in the CMRS context under Section 201(b) (*i.e.*, unjust and unreasonable), there must be a showing that "market conditions fail to produce rates that fall within a 'zone of reasonableness.'"[7] In this case, there can be no such showing.

The Commission has recently found that competition in the mobile marketplace "is developing throughout the industry," with as many as four new competitors licensed to provide broadband CMRS in each geographic market throughout the United States.[8] Since the Commission

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[4] *See, e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *AT&T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

[5] *Petition of Arizona Corporation Comm'n to Extend Rate Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, PR Docket No. 94-104, *Report and Order and Order on Reconsideration*, 10 F.C.C.R. 7824, 7826 (1995); *see Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 F.C.C.R. 2873, 2886, 2889-2900 (1989), *recon.*, 6 F.C.C.R. 665 (1991); *see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 92-266 & 93-215, *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 F.C.C.R. 1226, 1235, 1238-39, 1248-54 (1994), *recon.*, 11 F.C.C.R. 785 (1995).

[6] *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7826 (citations omitted); *see FERC v. Pennzoil Producing*, 439 U.S. at 517 (stating that the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs") (citation omitted); *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 316 (1974) (emphasizing that it was permissible for an agency to consider non-cost factors in assessing what are just and reasonable rates); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502-03 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates).

[7] *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7826.

[8] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile*

issued its first report on competition in the CMRS industry in 1995, the CMRS market has continued to undergo major changes that have "resulted in increased competition and convergence among CMRS services."[9] Indeed, there may be no fewer than nine licensed providers in each market. This increased competition has led to a growing number of rate and service options offered by CMRS carriers. As noted by SBMS, while many carriers charge on a per minute basis, others offer per-second billing, or flat-fee rates with various quantities of minutes (measured in various ways) free.[10] Additionally, while many carriers charge customers for both incoming and outgoing calls, others are offering the first minute of incoming calls free or, in isolated cases, calling party pays ("CPP").[11]

The Commission itself has found that with the increase in competition in the CMRS marketplace, "there has been a noticeable increase in the number of lower-priced service packages and alternative service options and features such as paging, voice mail, first-minute of incoming-calls free, and caller ID."[12] The Commission has noted that an essential tenet of competing in the mobile marketplace is the ability to "provid[e] services with *different* features, functions, *cost*, and quality of service."[13] Given the expanding number of CMRS competitors and rates and services offered, if consumers are unhappy with a per minute rate, one or more competitors will respond to demand for smaller billing increments. This has already happened in the wireless industry, where Nextel now offers subminute billing increments. Certain long distance companies also use subminute billing as a means of differentiating themselves. Accordingly, BellSouth agrees with

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Services, Second Report, 12 F.C.C.R. 11266, 11269, 11276 (1997) (*"Second Annual CMRS Competition Report"*).

9 *Second Annual CMRS Competition Report*, 12 F.C.C.R. at 11272.

10 Petition at 5.

11 *See id.* at 5-6. BellSouth notes that nowhere in the CPP inquiry in WT Docket No. 97-207 has the FCC suggested that the current schematic for land-to-mobile billing is unjust or unreasonable.

12 *Second Annual CMRS Competition Report*, 12 F.C.C.R. at 11269.

13 *Second Annual CMRS Competition Report*, 12 F.C.C.R. at 11312 (emphasis added).

SBMS that the Commission should declare "that a CMRS provider's choices of rate plans are competitive rate-setting decisions which are best left to the increasingly competitive marketplace."[14]

In fact, a recent study by the California Public Utilities Commission looked at the reasonableness of current rate practices, and found that requiring telephone companies to charge in increments shorter than one minute was not in the public interest. The report noted that major local exchange, long distance, and cellular providers do not offer subminute billing, with good reason:

> [T]he Commission recommendation to the Legislature is to allow competition and consumer demand, rather than statutory requirement, to create telecommunications services with subminute billing. The short term benefits of mandatory subminute increments . . . are outweighed by the disadvantages. Disadvantages . . . include: decreased competition, increased regulatory complexity and micromangement of the economic product offerings, complex billing processes, and inconsistencies with the . . . policies of encouraging competition in the telecommunications industry.[15]

Similarly, the FCC has previously looked approvingly at the practice of charging in whole minute increments by concluding that mandating per second charging appeared "unlikely to benefit consumers" since the rates charged to the customer might ultimately remain unchanged, yet competition would be reduced because carriers could no longer differentiate by offering different billing increments.[16] Moreover, charging in whole minute increments has also long been present and approved of in the CMRS[17] and long distance[18] industries, just as charging for many other goods and

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[14] Petition at 6.

[15] California Public Utilities Commission, "Compliance Report on Senate Bill No. 1998, Subminute Billing for Telecommunications Companies," at 3-4 (Dec. 29, 1995).

[16] *See* Letter from Kathleen Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq., at 1-2 (dated Dec. 2, 1993) ("Levitz Letter") ("We believe it is unlikely that the rule changes you seek will reduce consumer phone bills. If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per second rates at a level designed to recover the revenues that were generated by the previous rates.").

[17] *See Cellular Mobile Systems of Tampa*, 60 Rad. Reg. 2d (P & F) 538 (1985).

[18] *See AT&T and the Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8)*, 91 F.C.C.2d 1079 (1982).

services on the basis of minimum units or increments is a common practice.[19] Thus, there is no basis on which to conclude that this practice is inherently unjust or unreasonable.

Charging for incoming calls is also common in the CMRS industry and has been long accepted, indicating the reasonableness of such a practice.[20] Indeed, the wireline telephone industry has long offered a variety of called-party pays services (*e.g.*, "800," collect, Enterprise and Zenith) in response to consumer demand. Accordingly, given that these rates "reflect or emulate competitive market operations,"[21] they fall within the "zone of reasonableness" under Section 201(b) and should be explicitly declared lawful by the Commission.

II. STATE LAW CHALLENGES TO CHARGING IN WHOLE MINUTE INCREMENTS OR FOR INCOMING CALLS ARE PREEMPTED UNDER SECTION 332(c)(3)

No state may regulate the decisions by CMRS carriers to charge customers for calls in whole minute increments and for incoming calls, because states are preempted from regulating rates and charges under Section 332. Specifically, in 1993, Congress amended the Section 332 of the Communications Act to provide that "no State . . . shall have any authority to regulate the . . . rates

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[19] For example, apartments are usually rented by the month, hotels charge per night, and parking garages charge by the hour or half-hour. A consumer needing a two-week rental unit, a guest staying in a hotel room for several hours, or a motorist parking for sixty-three minutes must pay for the entire additional incremental units, even though part of the units were not used.

[20] *See* Petition at 10 & n.19. Cellular systems are affected the same way for both incoming and outgoing calls from a resource allocation standpoint, and CMRS carriers are limited by their radio license to a finite number of radio channels. While BellSouth agrees that SBMS' definition of "call initiation" is one reasonable definition, Petition at 11-12, there are many ways in which call initiation may be defined. BellSouth, for example, does not determine call initiation, or bill for airtime, in the same way as SBMS. The Commission should not stifle the competitive marketplace by promulgating a single, standard definition of this term.

[21] *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7826; *see Policy and Rules Concerning Rates for Dominant Carriers*, 4 F.C.C.R. at 2886, 2889-2900; *see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 F.C.C.R. at 1235, 1238-39, 1248-54.

charged by any commercial mobile service."[22] The Commission has previously concluded that this provision expresses "an unambiguous congressional intent to foreclose state regulation in the first instance."[23] Decisions regarding whether to charge customers in whole minute increments or for incoming calls clearly affect, and are directly related to, the term "rates charged" to customers. Thus, BellSouth agrees with SBMS that the Commission should declare that the term "rates charged" includes not only the monetary charge, but also the units by which the rate is calculated (*e.g.*, minute or fraction thereof) and the service to which the rate applies.[24]

Judicial challenges to such rate practices must also be barred by Section 332(c)(3), because "[i]t is undisputed that . . . judicial action constitutes a form of state regulation. Thus, . . . state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme."[25] As SBMS notes, suits challenging the decisions of CMRS carriers to charge in whole minute increments or for incoming calls which seek damages or an injunction are at their core attacks on how carriers assess charges, what they choose to charge for, and how much they choose to charge.[26] Thus, any award of damages would set rates retroactively for CMRS services, thereby effectively amounting to prohibited rate regulation.[27] Similarly, an injunction would involve state law in a determination

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22 47 U.S.C. § 332(c)(3); *see* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002 ("OBRA" or "Budget Act").

23 *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1504 (1994) ("*CMRS Second Report and Order*"), *recon. granted in part*, 10 F.C.C.R. 7824 (1995).

24 *See* Petition at 14. BellSouth agrees with SBMS that such a definition leaves room for the states' authority under the "other terms and conditions" clause of Section 332(c)(3)(A) for regulation of such activities as how often a bill is sent, when a bill is due, and what information the bill contains. *See id.* at nn. 25, 26.

25 *Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996); *see Shelley v. Kramer*, 334 U.S. 1 (1948) (considering action taken by state courts to be the equivalent of state action for Fourteenth Amendment purposes).

26 *See* Petition at 16.

27 Petition at 16, 18-23

regarding whether the rates were reasonable,[28] something governed exclusively by federal law under Section 332(c)(3)(A).

In fact, in implementing OBRA, the Commission concluded that a state seeking to retain or initiate rate regulation of CMRS providers must "clear substantial hurdles" in demonstrating that regulation is warranted.[29] Specifically, a state must show that CMRS "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[30] Given that "OBRA reflects a general preference in favor of reliance on market forces rather than regulation"[31] and that "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need,"[32] such a showing is, by design, a substantial one.

No such showing has been or can be made here. As shown above in Section I, the rate practices at issue here are just and reasonable, and therefore the states cannot avail themselves of the market forces argument. As the legislative history of OBRA makes plain, Congress intended to establish a *national* regulatory policy for CMRS,[33] not a policy that is "balkanized state-by-state."[34] BellSouth agrees with SBMS that "[d]isparate state regulation would significantly raise [CMRS] providers' operating costs," thereby discouraging the entry of new wireless providers contrary to the goals of the 1993 Budget Act.[35] Accordingly, the Commission should declare that any judicial

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28 *Id.* at 16, 23-24.

29 *See CMRS Second Report and Order*, 9 F.C.C.R. at 1504.

30 47 U.S.C. § 332(c)(3)(A)(i).

31 *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7826; *see* 47 U.S.C. § 332(c)(1)(A).

32 *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7827.

33 *See* H.R. Conf. Rep. No. 103-213, at 480-81 (1993).

34 *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7828.

35 *See* Petition at 30-31.

action or state regulation regarding charging in whole minute increments or for incoming calls is explicitly preempted under the Act.

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission to grant SBMS' Petition for Declaratory Ruling.

Respectfully submitted,

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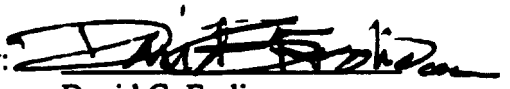
By: 

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January 7, 1998

CERTIFICATE OF SERVICE

I, Craig E. Gilmore, hereby certify that on this 7th day of January, 1998, copies of the foregoing "Comments of BellSouth" in response to DA 97-2464 were served by hand on the following:

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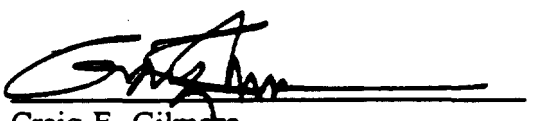

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